In the District Court of the United States for the District of Columbia

No. 15347 (Civil)

KENNETH BENDER ET AL., PLAINTIFFS-APPELLANTS

v.

CLAUDE R. WICKARD, DEFENDANT-APPELLEE

Filed Mar. 31, 1943. Charles E. Stewart, Clerk.

MOTION TO AFFIRM

Appellee, pursuant to Rule 12, Paragraph 3 of the Revised Rules of the Supreme Court, moves that the judgment of the District Court be affirmed.

This is a direct appeal from the final judgment of a specially constituted court of three judges, convened pursuant to the Act of August 24, 1937 (50 Stat. 752; 28 U. S. C. 380a), dismissing appellants' complaint to enjoin and restrain the appellee, the Secretary of Agriculture, from collecting the penalty under the Agricultural Adjustment act of 1938 (52 Stat. 31; 7 U. S. C. 1281 *et. seq.*) on appellants' excess wheat of the

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1941 crop and from enforcing the lien of the Government against such wheat.

The court's final judgment was entered on March 11, 1943; an appeal was allowed on March 17, 1943; and appellee was served with the appeal papers on March 18, 1943.

The judgment of the District Court should be affirmed without argument because the appeal therefrom presents no substantial question, all of the issues having been settled by previous decisions of the Supreme Court. *California Water Service Co.* v. *Redding,* 304 U. S. 252, 255.

Four principal questions were raised in the District Court: (1) that the Agricultural Adjustment Act of 1938 as amended is not within the commerce power for the reason that most of the wheat regulated under the Act, including appellants' wheat, is consumed within the states where it is produced, and for the further reason that the Act attempts to control production; (2) that the Act violates due process since appellants cannot obtain marketing cards to dispose of their wheat without paying the penalty on their excess wheat for the 1941 crop, and collection of the penalty of 49 cents per bushel on such excess wheat or enforcement of the Government's lien for the amount of the penalty would result in confiscation of appellants' property; (3) that the Act is violative of due process in that it is retroactive, the wheat having already been planted at the time

the regulation went into effect; (4) that the referendum of wheat farmers held by the Secretary of Agriculture to determine whether a national marketing quota was favored by two-thirds of the farmers who would be subject to the quota was in violation of due process in that it was held after the wheat had been planted.

All of the questions raised in this case have been decided adversely to appellants' contentions in *Wickard* v. *Filburn*, 317 U. S. 111, and *Beckman* v. *Mall*, No. 134, decided Nov. 19, 1942.[1] In fact, in the *Beckman* case the complaint was substantially identical with the complaint under consideration. In that case the District Court had dismissed the bill on the ground that no relief could be granted in the absence of the Secretary of Agriculture, an indispensable party. This Court, without motion by the Government, affirmed the dismissal of the complaint "on the authority of *Wickard* v. *Filburn* * * * without consideration of the grounds relied upon by the court below for dismissing the bill." Every reason that led to the affirmance without argument in the *Beckman* case applies equally to the case at bar.

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[1] In addition, the last-stated question, namely that the referendum violated due process because held after the wheat had been planted, is directly settled by the holding in *Mulford* v. *Smith*, 307 U. S. 38.

For the foregoing reasons it is respectfully submitted that the judgment of the District Court should be affirmed.[2]

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[2] At the time this case was instituted, *Wickard* v. *Filburn*, *supra*, had not been decided and the constitutional questions were still substantial. The three-judge court, accordingly, had jurisdiction to dismiss the complaint. See *California Water Service Co.* v. *Redding*, 304 U. S. 252, 255.

CHARLES FAHY,
Charles Fahy,
Solicitor General.

MARCH 29, 1943.

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